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No. 625

In the Supreme Court of the United States

OCTOBER TERM, 1959

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Acting Assistant Attorney General,
RICHARD A. SOLOMON,
Attorney,
Department of Justice, Washington 25, D.C.

JOHN L. FITZGERALD,
General Counsel,
MAX D. PAGLIN,
Assistant General Counsel,
RUTH V. REEL,
Counsel,
Federal Communications Commission, Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–21a) has not yet been reported. The decisions and orders of the Federal Communications Commission (J.A. 13–46, 182–198) have not been officially reported but are unofficially reported at 17 Pike & Fischer Radio Regulation 1505, 1587.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1959. The petition for a writ of

certiorari was filed on December 31, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission amended its rules to provide that certain radio frequencies, previously shared by government and non-government users for radionavigation, were henceforth to be available to non-government users on a temporary basis only. It concluded that public interest considerations of national defense and safety of life and property required the amendment in the light of representations by the Office of Civil and Defense Mobilization ("OCDM") that the frequencies were needed for vital defense facilities of the Federal government, and the availability of other frequencies which could be assigned for the exclusive use of the radionavigation stations affected.

The following questions are presented:

1. Whether the Commission's action violated a treaty to which the United States is a party.

2. Whether the Commission abused its discretion in relying upon the OCDM representations as to national defense needs, in determining that the public interest would be served by amending its rules in the manner indicated.

3. Whether the court of appeals properly denied petitioners access to certain classified material, furnished by OCDM to the Commission, that set forth the national defense considerations involved.

STATUTES AND TREATIES INVOLVED

The pertinent provisions of the Communication Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) and of the International Telecommunication Convention, Buenos Aires 1952 (T.I.A.S. No. 3266), in addition to those set forth in the Petition (pp. 22a–26a), are set forth in the appendix, *infra*, pp. 16–19.

STATEMENT

Prior to April 16, 1958, the 8500–9000 megacycle (Mc) band of the radio spectrum had been shared by government and non-government users for radionavigation purposes[1] (47 C.F.R. 2.104(a)(5), 1958 ed.; J.A. 188). On that date, the Commission amended its Table of Frequency Allocations to limit the access to the band by the non-government users subject to its authority (J.A. 13–46).[2] It did so by deleting the provision in the Table allocating the band to non-government radionavigation use and substituting, in lieu thereof, footnote US 120, which provides (J.A. 24):

> In the band 8750–8850 Mc/s, Government and non-Government airborne doppler radars in the aeronautical radionavigation service may be

[1] Government users had operated in this band pursuant to authority granted by the President under Section 305 of the Communications Act of 1934 and the non-government users pursuant to Commission authority under Sections 301 and 303 of the Act. See *infra*, pp. 9, 12–13.

[2] Although the Commission's order made a number of changes in the Table of Frequency Allocations (J.A. 18–46), only changes in the 8500–9000 Mc band are here challenged. The Commission's actions relating to the 420–450 Mc band were challenged below in a separate appeal, consolidated with the instant proceeding for briefing and argument. (Case No. 14650, C.A.D.C.)

authorized temporarily until moved to a frequency band allocated to the aeronautical radionavigation service, and meanwhile must accept any harmful interference that may be experienced from the radiopositioning service.

At the same time the Commission adopted a Notice of Proposed Rule Making (23 F.R. 2698) proposing, *inter alia*, to make the frequency band 13,250–13,400 Mc available for radionavigation use by non-government stations.

The Commission acted on the basis of a request by the Office of Defense Mobilization [3] ("OCDM"), acting on behalf of the President,[4] which stated that vital national defense considerations required the President to assign these frequencies to government users to meet increased radiopositioning requirements (J.A. 14–15, 183–184).[5] Because of the likelihood of mutually harmful interference between high-power government and non-government operations in the affected frequency bands, OCDM requested the Commission to place immediate limitations upon non-government use of these frequencies in order to permit their effective

[3] This agency is now called the Office of Civil and Defense Mobilization, and will be referred to as "OCDM."

[4] By Executive Order 10460 of June 16, 1953 (18 F.R. 3513), the Director of OCDM is responsible, *inter alia*, for advising and assisting the President with respect to his telecommunication functions under Section 305 of the Communications Act, and is directed to "cooperate with the Federal Communications Commission on problems of mutual concern."

[5] As defined by the Commission (J.A. 21), radiopositioning is the "determination of position or direction * * * for purposes other than the navigation of ships or aircraft, or other than warning of obstructions to navigation."

use by the President (*ibid.*). Since the OCDM request bore a security classification, it has not been made public. Executive Order No. 10501 (18 F.R. 7049); Section 4(j) of the Communications Act of 1934 (J.A. 184).[4]

Upon the basis of these representations concerning national defense requirements, and taking into account non-government needs for radio frequencies, including those described in the records of two pending comprehensive Commission fact-finding proceedings involving future allocation of frequencies (J.A. 184, 187), the Commission ruled that the defense requirements were paramount and that "it would be in the public interest to amend its Rules to permit the orderly satisfaction of those requirements" (J.A. 17). Because of the "urgency and nature of the Government requirements and the vital national defense considerations involved," the Commission found it "impracticable and contrary to the public interest" to comply with the notice requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. 1003), and ordered the amendments to its Rules to become effective immediately (J.A. 17, 186).

Thereafter, petitioners filed a "Petition to Reconsider and Vacate Certain Parts" of the Commission's April 16 Order. They urged particularly that the band 8750–8850 Mc was necessary for the development of self-contained airborne "doppler" radar for navigational use in civil aircraft, and that the new

[4] Section 4(j) (47 U.S.C. 154(4)(j)) authorizes the Commission "to withhold publication of records or proceedings containing secret information affecting the national defense."

restriction against permanent non-government use of the band should be removed despite a "risk" of interference between government and non-government operations (J.A. 194, 60–61). The Commission denied reconsideration and reaffirmed its earlier order (J.A. 182–198).

Again concluding (J.A. 194–198) that the government's requirements in this portion of the spectrum were paramount and that the public interest required adherence to the rule change, the Commission stated (J.A. 194–195):

> The OCDM has advised the Commission that the relief requested by petitioners again cannot be reconciled with the national defense requirements in this area of the spectrum. The loss of any significant portion of spectrum space in the 8500–10000 Mc region would make the radiopositioning service inoperative at major defense installations. Further, under the circumstances, it is the judgment of the Commission that it would not be in the public interest for two vital services, radiopositioning, and aeronautical radionavigation, one involving the security of the nation and the other the safety of life, to utilize the same frequency band on a permanent basis.

While emphasizing (J.A. 196) that its determination against permanent authorization of civil dopplers at 8800 Mc was "predicated on the fundamental allocation premise regarding the undesirability of sharing vital national defense and airborne safety functions in the same frequency band," the Commission took account of the practical problems facing petitioners

(J.A. 197). Thus, in view of the fact that the Commission had already licensed a "limited number" of dopplers at 8800 Mc in accordance with the provisions of its previous allocation,[7] and that the new 13250–13400 Mc band for dopplers was only then being made available[8] and no equipment for its use then existed, the Commission stated it "wish[ed] to emphasize that there will be no discontinuance of licensing availability in this band [8800–9000 Mc] for airborne doppler equipments as long as US 120 remains in the Rules" (*ibid.*). It stated that it "anticipated" that regular licensing of dopplers at 8800 Mc would continue until the state of the art and the availability of equipment permitted a transition to the 13,000 Mc band and that at that time the Commission would "to the greatest extent possible" endeavor to provide a reasonable amortization period (*ibid.*).

Following the filing of petitions for review, the Commission certified to the court of appeals the public record of the proceedings, but stated that it was withholding the classified material submitted to it by OCDM. Petitioners moved the court to require the Commission to supplement the record with the classified material (J.A. 212–214). The Government opposed the motion, filing in connection therewith a claim of privilege by the Director of OCDM (J.A.

[7] The Commission noted (J.A. 194, 195, n. 9), however, that petitioners had not selected the 8800 Mc band for development of doppler equipment until March 1958, less than six weeks before the rules were amended.

[8] The Proposed Rule to make 13250–13400 Mc available for the non-government users (see p. 4, *supra*), was made final on July 30, 1958 (23 F.R. 6111).

216–218), supported by an affidavit of the Deputy Secretary of Defense (J.A. 218–219). After oral argument at a pre-hearing conference, Judge Danaher directed that the classified material be transmitted to the court, but upon condition that it be sealed and placed securely in the Clerk's office "to be available to the division before which the review proceedings shall come on to be heard, or before the court as the case may be * * *" (J.A. 227–229).

The court of appeals unanimously affirmed the Commission's orders (Pet. App. 1a–21a). Holding that the Communications Act gives the Commission "authority to modify its Rules to accommodate the [frequency] requirements of the Government" (Pet. App. 16a, 8a–9a, 10a–13a), the court found no abuse of such authority in the Commission's action limiting the availability of frequencies in the 8500–9000 Mc band for non-government radionavigation use (Pet. App. 17a–21a). The court expressly held that "[t]he Commission's amended Rule in no way whatever impinged upon our Government's treaty obligations * * *." (Pet. App. 17a). It likewise rejected petitioners' contention that the Commission's acceptance of the representations of OCDM as to defense needs invalidated the Commission's determination that the public interest would be served by restricting non-government use of the 8500–9000 Mc band in order to aid the national defense and promote safety of life. (Pet. App. 16a–20a). Finally, the court refused (Pet. App. 20a–21a) to make the classified material available to petitioners since (1) the claim of privilege "must be

honored" and (2) the court in any event found it "not essential that we examine the classified material."

ARGUMENT

1. Contrary to petitioners' contention (Pet. 8–10), the Commission's action in this case did not violate the provisions of any radio treaty to which the United States is a party.

The argument rests upon a basic misconception of what the Commission did. The Commission did not, as petitioners mistakenly assume, itself allocate the 8500–9000 Mc band to government radiopositioning. That allocation was made by the President, pursuant to his exclusive jurisdiction under Section 305 of the Communications Act to assign frequencies to radio stations or classes of stations "belonging to and operated by the United States." The sole action taken by the Commission was to limit the use of the frequency band by non-government licensees. It is this action of the agency in limiting non-government use of the frequency, and not the President's action in assigning it to government radiopositioning, that must be tested against the treaty standards.

The court of appeals was plainly correct in holding (Pet. App. 17a) that this action by the Commission "in no way whatever impinged upon our Government's treaty obligations to foreign signatories utilizing that frequency for radionavigation, as permitted by the" treaty involved (the International Telecommunication Convention, Buenos Aires 1952, T.I.A.S. 3266). The International Table of Frequency Allocations attached to that Convention (Chap. III, Article 5, Section 5

of the Radio Regulations, T.I.A.S. 1901) allocated the band 8500–9800 Mc on a world wide basis to radionavigation (with two footnote reservations not here relevant). (Pet. App. 26a). The Commission's amended Rule makes no allocation for the band 8500–9000 Mc except for the provision in Footnote US 120 that domestic non-government airborne doppler radars in the aeronautical radionavigation service may continue to use the band temporarily (J.A. 21, 24)—a use entirely consistent with the international allocation to radionavigation. The International Radio Regulations afford petitioners no right to use internationally allocated spectrum space where such use has not been authorized by the United States pursuant to its domestic laws. Here, as we have pointed out, the President has assigned the space to defense radiopositioning.[9]

2. There is no merit to petitioners' attack (Pet. 10–16) on the Commission's acceptance of the OCDM representations regarding national defense needs as a

[9] Although the President's action is not in accord with the frequency allocations of a subordinate provision (the International Radio Regulations) of the treaty, it is fully justified by the overriding provisions of the treaty itself (the Buenos Aires Convention (Art. 12(3), 19 and 48)). Under Article 19, Sec. 1 of the Convention, the United States is "bound to abide by the provisions of this Convention and the Regulations annexed thereto * * * except in regard to services exempted from these obligations in accordance with the provisions of Article 48 of this Convention." Article 48 provides that "Members and Associate Members retain their entire freedom with regard to military radio installations of their army, naval, and air forces." Since the President's action here dealt with "military radio installations" (see J.A. 217, 218–219), it comes within the exception of Article 48.

basis for its conclusion that the public interest required that non-government users be excluded from the 8500–9000 Mc band. Despite petitioners' broad statements (Pet. 10, 12) that the decision below authorizes the "unbridled" "presidential seizure of frequencies," the actual holding below was a narrow one. The Commission made the requisite statutory findings that eventual exclusion of private licensees from the frequency involved was in the public interest, and explained its reasons in detail (J.A. 194–197). The only question is whether, in making that determination, the Commission was warranted in accepting the OCDM representations as to the national defense considerations involved.

In the light of the representations by the OCDM as to the defense needs for use of the 8500–9000 Mc band, and the further fact that the 13000 Mc band could be made available for civilian radionavigation use, the Commission's determination that the government requirements were in this instance paramount and that the public interest would be served by making non-government access to the 8800 Mc band temporary is, as the court stated (Pet. App. 20a), "eminently reasonable and in no respect arbitrary and capricious." In making that determination, the Commission was fully warranted in accepting the representations of those responsible for the national defense as to national defense needs. Clearly the agency was not required, as petitioners apparently would have it do (Pet. 13–16), to make its own independent judgment as to the national defense requirements. See *Marbury* v. *Madison*, 1 Cranch

137, 164; *Kilbourn* v. *Thompson*, 103 U.S. 168, 191; *Chicago & Southern Air Lines, Inc.*, v. *Waterman S.S. Corp.*, 333 U.S. 103, 111. The Commission's consideration was necessarily limited to the question whether governing public interest considerations required it to take allocation action in the light of the stated national defense considerations.

Petitioners' argument overlooks the fact, which the court of appeals recognized (Pet. App. 8a, n. 13; 21a, n. 37), that the Communications Act provides a dual system of frequency allocation by the President and the Commission. Each has independent authority to assign frequencies—the President for government use under Section 305, and the Commission for non-government use under Sections 301 and 303—and each may act independently of the other. Similarly, apart from the provisions of Section 606 giving the President broad allocation authority in time of war or upon proclamation of certain other types of "national emergency" (not here involved), neither the President nor the Commission can compel the other to refrain from using any frequency. Accommodation between these two co-equal authorities to prevent interference in the use of radio frequencies is, as Congress has long been aware, a matter of voluntary cooperation.[10] See

[10] In practice, by voluntary agreement with the Executive Branch, the Commission has the exclusive use of certain parts of the spectrum for its licensees, refrains from using other parts to permit exclusive government use, and shares much of the spectrum with the government. On these shared portions the Commission and the Executive Branch consult before making frequency assignments. *Twenty-Third Annual Report of the Federal Communications Commission* (1957), p. 41.

H. Rep. 2095, 78th Cong., 2d Sess., pp. 12–14; S. Doc. 53, 83d Cong., 1st Sess., p. 1; S. Rep. 1854, to accompany S.J. Res. 106, 85th Cong., 2d Sess., pp. 3, 4, 10, 13, 18; cf. A Report by the President's Communications Policy Board, *Telecommunications—A Program for Progress* (G.P.O. 1951), pp. 193–195.

The court below correctly held (Pet. App. 16a, 10a–12a) that the Commission has authority under Sections 1, 4(i), 4(j) and 303 of the Act to accommodate its frequency assignments to the requirements of the government where the Commission determines that it would serve the public interest to do so. The use of the radio spectrum to aid the national defense, along with promotion of safety of life and property in general, are among the stated purposes (in Section 1 of the Act) for which the Commission was created. The court's comments (Pet. App. 16a, 12a, 21a) as to Presidential prerogatives and responsibilities related to petitioners' contention, here renewed (Pet. 13–16), that the Commission abdicated its statutory responsibilities by relying on Executive representations as to national defense needs. As we have shown (*supra*, pp. 10–12), the court properly rejected that contention.

3. Finally, there is no merit in petitioners' contention (Pet. 16–17) that the court of appeals erred in declining to make available to them the classified material submitted to the Commission by OCDM. The formal claim of privilege of the Director of OCDM and the supporting affidavit of the Deputy Secretary of Defense (J.A. 216–218, 218–219) clearly

establish that "military secrets are at stake" (*United States* v. *Reynolds*, 345 U.S. 1, 6–11). The court of appeals was accordingly warranted in concluding (Pet. App. 21a) that the claim of privilege "must be honored".

Moreover, petitioners were not prejudiced by not having access to the classified material. For the only issue relating thereto appropriate for judicial review was the legality of the Commission's reliance upon the national defense representations. Either the Commission was authorized to accept them (as the court below held, without itself finding it necessary to examine the classified material (J.A. 214)), or it was not. The answer to that question, however, does not turn upon the contents of the classified material, but upon the scope of the Commission's authority.

CONCLUSION

The decision of the court of appeals is correct, there is no conflict of decisions, and no questions warranting further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

JOHN L. FITZGERALD,
General Counsel.

MAX D. PAGLIN,
Assistant General Counsel.

RUTH V. REEL,
Counsel,
Federal Communications Commission.

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APPENDIX

Additional pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), are as follows:

TITLE I—GENERAL PROVISIONS

* * * * * *

PROVISIONS RELATING TO THE COMMISSION

* * * * * *

SEC. 4.

* * * * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * * *

TITLE III—SPECIAL PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any

other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * *

Additional pertinent provisions of the International Telecommunication Convention, Buenos Aires, 1952 (T.I.A.S. No. 3266), are as follows:

ARTICLE 12—REGULATIONS

* * * * * *

3. In case of inconsistency between a provision of the Convention and a provision of the Regulations, the Convention shall prevail.

* * * * * *

ARTICLE 19—EXECUTION OF THE CONVENTION AND REGULATIONS

1. The Members and Associate Members are bound to abide by the provisions of this Convention and the Regulations annexed thereto in all telecommunication offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio services of other countries, except in regard to services exempted from these obligations in accordance with the provisions of Article 48 of this Convention.

* * * * * *

ARTICLE 48—INSTALLATIONS FOR NATIONAL DEFENCE SERVICES

1. Members and Associate Members retain their entire freedom with regard to military radio installations of their army, naval and air forces.

* * * * * *